

Exhibit A

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

RENO MAY, an individual; ANTHONY
MIRANDA, an individual; ERIC HANS,
an individual; OSCAR A. BARRETTO,
JR., an individual; ISABELLE R.
BARRETTO, an individual; BARRY
BAHRAMI, an individual; PETE
STEPHENSON, an individual;
ANDREW HARMS, an individual;
JOSE FLORES, an individual; DR.
SHELDON HOUGH, DDS, an
individual; SECOND AMENDMENT
FOUNDATION; GUN OWNERS OF
AMERICA; GUN OWNERS
FOUNDATION; GUN OWNERS OF
CALIFORNIA, INC.; THE LIBERAL
GUN CLUB, INC.; and CALIFORNIA
RIFLE & PISTOL ASSOCIATION,
INCORPORATED,

Plaintiffs,

v.

ROBERT BONTA, in his official
capacity as Attorney General of the State
of California, and DOES 1-10,

Defendants.

Hon. Cormac J. Carney

Case No.: 8:23-cv-01696-CJC-ADS

**BRIEF FOR PROFESSORS OF
PROPERTY LAW AS AMICI
CURIAE IN SUPPORT OF
DEFENDANT BONTA'S
OPPOSITION TO MOTIONS
FOR PRELIMINARY
INJUNCTION**

MARCO ANTONIO CARRALERO;
GARRISON HAM; MICHAEL
SCHWARTZ; ORANGE COUNTY
GUN OWNERS PAC; SAN DIEGO
COUNTY GUN OWNERS PAC;
CALIFORNIA GUN RIGHTS
FOUNDATION; and FIREARMS
POLICY COALITION, INC.,

Plaintiffs,

v.

ROB BONTA, in his official capacity
as Attorney General of the State of
California,

Defendant.

Hon. Cormac J. Carney

Case No.: 8:23-cv-01798-CJC-ADS

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1 **INTEREST OF AMICI CURIAE¹**

2 Amici curiae are professors specializing in property law. Ian Ayres is Oscar
3 M. Ruebhausen Professor at Yale Law School. Fredrick Vars is Ira Drayton Pruitt,
4 Sr. Professor of Law at University of Alabama School of Law. Professors Ayres
5 and Vars have written extensively on the relationship between property law and
6 firearm regulation, including in their book *Weapon of Choice: Fighting Gun*
7 *Violence While Respecting Gun Rights* (Harv. U. Press, 2020).

8 Amici have an interest in the doctrinal and policy issues implicated by this
9 case, particularly as they relate to the constitutionality of SB2's private-property
10 default rule codified at Cal. Penal Code § 26230(a)(26). Because longstanding
11 principles of property law clarify that an individual's constitutional right to carry
12 ends at another's property line, this Court should find that the default rule does not
13 implicate the text of the Second Amendment.

14 **INTRODUCTION**

15 The legislative selection of default rules, including whether guns are
16 presumptively permitted on private property, is part and parcel of States' enduring
17 prerogative to reinforce private owners' right to exclude. This selection does not
18 implicate the Second Amendment's "plain text," *New York State Rifle & Pistol*
19 *Association v. Bruen*, 142 S. Ct. 2111, 2129-2130 (2022), because the right to carry
20 is not a right to trespass and thus does not extend beyond another's private
21 property line. California's private-property default rule, which construes a private
22 commercial owner's silence on the permissibility of firearms as disallowance while
23 preserving the owner's ability to welcome firearms if they so choose, is thus
24 constitutional.

25
26
27 ¹ The views of the amici expressed here do not necessarily reflect the views
28 of the institutions with which they are or have been affiliated, whose names are
included solely for purposes of identification.

1 As explained in Part I, the right to exclude—including the right to exclude
2 firearms—inheres in all private property and is given effect through State-created
3 default rules. States have always been free to adjust default rules to suit private
4 owners’ expectations and preferences. Aligning default rules with owners’ general
5 understanding as to what their *own* silence implies gives content to the right to
6 exclude by ensuring that a property’s operative terms of entry are underwritten by
7 the owner’s informed consent. California’s private-property default rule should be
8 understood within this American property tradition.

9 As explained in Part II, the Second Amendment does not guarantee a right to
10 carry onto another’s property over that owner’s objection. The owner’s right to
11 exclude is “universally held to be a fundamental element of the property right,”
12 *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021), and necessarily
13 encompasses the right to set terms of entry regarding firearms. *Bruen* did not
14 announce a right so sweeping as to displace centuries-old property rights.

15 And just as there is no individual right to bear arms on another’s private
16 property over an owner’s objection, neither is there a freestanding constitutional
17 right to a presumption that a private owner welcomes firearms until they say
18 otherwise. Constitutional rights do not operate in such a conditional manner.
19 Were there a right to carry firearms onto another’s private property, it would trump
20 an owner’s objection—not rise or fall with their preference. Such a sweeping right
21 would vitiate the right to exclude and must be rejected.

22 Thus, California’s private-property rule should be determined constitutional
23 at *Bruen* Step One because Plaintiffs have not satisfied their burden of
24 demonstrating that the rule implicates the text of the Second Amendment.²
25

26
27 ² Though this brief focuses on the *Bruen* Step One question, amici fully
28 agree with the State’s *Bruen* Step Two historical analysis. *See* Defendant’s Op. at
43-45. California’s private-property default rule should thus be upheld if the Court
were to reach Step Two.

ARGUMENT

I. THE RIGHT TO EXCLUDE IS FOUNDATIONAL TO AMERICAN PROPERTY LAW AND ENABLED BY DEFAULT RULES

The right of private commercial owners to exclude firearms from their properties is no less at stake in this constitutional challenge than is the right to public carry. Before Part II’s examination of the private-property default rule under *Bruen* Step One (whether Plaintiffs have met their burden of demonstrating that the rule implicates the Second Amendment’s text), it is helpful to begin by considering the connection between default rules and the right to exclude.

The right to exclude is “one of the most treasured” rights of property ownership. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). It inheres in private commercial property as much as in private homes, because property does not “lose its private character merely because the public is generally invited to use it for designated purposes.” *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980). And it means that private owners retain broad authority over which individuals or objects to admit onto their premises, and generally cannot be forced by the State to grant access to unwanted entrants. *See Cedar Point*, 141 S. Ct. at 2080 (a regulation granting a person access to another’s property is a *per se* taking).

But an individual’s right to exclude is not self-actualizing or exercised in isolation. It is instead nested within a range of criminal, tort, and property laws that effectuate the right by regulating informational exchange between parties, imposing liability on those who violate an owner’s terms of entry, and clarifying default rules around which owners and potential entrants can negotiate access.

First, States routinely shape how owners make decisions as to whom or what to exclude. Legislation promoting the disclosure of information by prospective entrants can lower costs associated with the discovery of that information, enabling owners to execute terms of entry that more closely align with their preferences.

1 See Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich. L.
2 Rev. 1835, 1837-1838 (2006). Similarly, tort rules imposing liability for
3 wrongdoing or injury arising on an owner's premises can influence owners'
4 decisions to exclude certain forms of behavior. For instance, a private owner bears
5 a duty to protect guests from foreseeable dangers. See *Delgado v. Trax Bar &*
6 *Grill*, 113 P.3d 1159, 1169 (Sup. Ct. Cal. 1993). In the context of firearms
7 possession, such a liability rule shapes owners' decisions to admit guns onto their
8 premises even though it does not explicitly regulate guns as such. See Blocher &
9 Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the*
10 *Boundaries of the Second Amendment*, 83 U. Chi. L. Rev. 295, 298 (2016).

11 *Second*, States have long enforced private exclusion decisions through the
12 law of trespass. Trespass statutes peg an entrant's lawful status to the informed
13 consent of the private owner, enabling owners to enforce their chosen terms of
14 entry with the backing of the State's sanction. See Cal. Penal Code § 602. Civil
15 trespass similarly reinforces an owner's chosen terms by empowering owners to
16 demand compensation for unlawful entry. See Cal. Civ. Code § 1708.8.

17 *Third*, a private owner's right to exclude is enforced through default rules
18 fashioned by State legislatures and courts. Default rules codify presumptions
19 about an owner's terms of entry that govern until the owner states otherwise. As
20 such, every State has—and *must have*—default rules stipulating whether the
21 absence of common signifiers of exclusion (*e.g.*, a physical fence) communicates
22 consent to enter. States have also long adopted and reformulated default rules
23 calibrated to specific actions and items. For example, most States over the course
24 of the nineteenth century reversed the default rule as to whether domesticated
25 cattle were permitted to graze on another owner's land, thereafter placing the
26 burden on the visiting rancher to obtain that owner's express consent. See
27 Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta*
28 *County*, 38 Stan. L. Rev. 623, 660-661 & n.95 (1986). Through to the present,

1 States continue to realign default rules with the needs and preferences of owners to
2 support the integrity of private property. *See, e.g.*, Haw. Rev. Stat. Ann. § 183D-
3 26 (2019) (prohibiting hunting on private property without owner’s consent);
4 Borough of Westville, NJ General Legislation § 187-1, -2 (2007) (prohibiting
5 graffiti on private property without owner’s consent); Haw. Rev. Stat. Ann. § 521-
6 70(c) (2019) (prohibiting tenant from using unit for a commercial purpose without
7 owner’s consent); City of Jersey City, NJ Code of Ordinances § 245-7 (1978)
8 (prohibiting solicitation on private property without owner’s consent); Fla. Stat. §
9 934.50(3)(b) (2022) (prohibiting drones over private property without owner’s
10 consent).

11 The significant variation in default rules, across American history and
12 between the fifty States, makes evident that default rules are not and have never
13 been fixed by the federal Constitution. This flexibility is understandable
14 considering that default rules do not ban private behavior—they simply establish
15 baseline terms from which owners can easily depart. It is also understandable
16 considering that the regulation of private property is generally left to the States.

17 Indeed, States have always been free to tailor default rules to the
18 expectations and preferences of private owners in order to reduce opt-out costs
19 (thereby producing more efficient arrangements) and to better ensure that the flow
20 of people and objects onto property is backed by the informed consent of owners.
21 The Supreme Court recognized this very point in *Breard v. Alexandria*, 341 U.S.
22 622 (1951), a decision upholding a municipal default rule that disallowed door-to-
23 door solicitation unless a private owner expressly consented. The Court
24 understood that the City’s selected presumption, rather than its opposite, made it
25 more likely that owners would have their preferred terms of entry enforced: “A
26 householder depends for protection on his city board rather than churlishly
27 guarding his entrances with orders forbidding the entrance of solicitors. A sign
28 would have to be a small billboard to make the differentiations between the

1 welcome and unwelcome that can be written in an ordinance once cheaply for all
2 homes.” *Id.* at 640.

3 California’s shift from a “yes-carry” to a “no-carry” default was driven by a
4 similar concern: that guns are being brought onto commercial property without
5 informed consent from owners. For one, there has been widespread public
6 misunderstanding about the state of the law across California and the Ninth Circuit.
7 Over 65 percent of California respondents in one study answered “I don’t know” in
8 response to the question of whether customers are allowed to bring guns without
9 permission into private businesses, as did nearly 75 percent in response to whether
10 a plumber is allowed to bring a gun without permission into one’s home, and over
11 71 percent in response to whether a friend is allowed to bring a gun without
12 permission into one’s home. Ayres & Jonnalagadda, *Guests with Guns: Public*
13 *Support for “No Carry” Defaults on Private Land*, 48 J.L. Med. & Ethics 183,
14 tbl.A6 (Winter 2020). And the small number of respondents who thought they
15 knew the law were often mistaken—for instance, the 35 percent of California
16 respondents who thought they knew whether customers are allowed to bring guns
17 into private businesses without affirmative permission were nearly evenly split. *Id.*
18 The upshot of this confusion has been that owners who prefer not to have
19 concealed guns inside their establishments are often unknowingly permitting them.
20 Moreover, the “yes-carry” default raises a host of monitoring anxieties for owners,
21 who have reason to fear that some carrying visitors will fail to notice “no firearms”
22 signs and surreptitiously carry inside. Owners may also fear that posting “no
23 firearms” notices, even if reflective of their underlying preferences, would lead
24 potential criminals to infer that the owner is unarmed and the business vulnerable.

25 Given these circumstances, the “yes-carry” default is not just bad policy; it
26 also imperils the right to exclude and its foundational constitutional status. But the
27 “no-carry” default enhances the possibility of meaningful consent between
28 landowner and entrant, thus bolstering the integrity of property ownership.

1 **II. CALIFORNIA’S PRIVATE-PROPERTY DEFAULT RULE DOES**
2 **NOT IMPLICATE THE SECOND AMENDMENT BECAUSE THERE**
3 **IS NO CONSTITUTIONAL RIGHT TO CARRY A WEAPON ONTO**
4 **ANOTHER’S PROPERTY**

5 As a default rule, California’s private-property rule does not ban the carrying
6 of firearms onto commercial private property; it recasts the meaning of a private
7 owner’s silence on the issue. Because Plaintiffs bear the burden of demonstrating
8 that “the Second Amendment’s plain text covers [their] conduct,” they must
9 demonstrate that the act of carrying a gun onto another’s private commercial
10 property without first obtaining affirmative permission—the “conduct”
11 encumbered by the rule—is “cover[ed]” by the plain text. *Bruen*, 142 S. Ct. at
12 2129-2130.

13 At the outset, Plaintiffs hardly even *acknowledge*—much less satisfy—their
14 textual burden with respect to the private-property default rule. The *Carralero*
15 Plaintiffs devote but two paragraphs to the *Bruen* Step One question, *see Carralero*
16 Amended Mem. at 6, only referencing *Bruen*’s rejection of a “home/public”
17 distinction. But this only begs the operative question of whether private
18 commercial property is a “public” place where the right to carry extends. And the
19 *May* Plaintiffs make no mention of *Bruen* Step One at all, inexplicably jumping
20 straight into the Step Two historical analysis. *See May* Mem. at 4.

21 These defects aside, the conduct encumbered by the default rule—bringing a
22 gun onto another’s private commercial property without explicit consent—would
23 only be covered by the Second Amendment if one of two propositions were true:
24 that the Second Amendment provides a right to carry that supersedes the objection
25 of a private owner, or that the Second Amendment provides a standalone right to
26 the presumption that an owner welcomes firearms until the owner expressly states
27 otherwise. As considered in Section II.A and II.B respectively, both formulations
28 should be rejected.

A. There Is No Constitutional Right To Carry Onto Private Property Over An Owner’s Objection

Recognizing a constitutional right to carry onto another’s property that trumps or overrides that owner’s objection would be an unprecedented abrogation of the right to exclude, as it would bar owners from leveraging trespass laws to keep firearms off their property. Understandably, this formulation of the right has been rejected by each of the five district courts to consider private-property default rules. *See, e.g., Siegel v. Platkin*, 2023 WL 1103676, at *16 (D.N.J. Jan. 30, 2023) (“[T]he Second Amendment does not include protection for a right to carry a firearm in a place ... against the owner’s wishes.”).³

1. Extending the right to public carry onto private property would be an unprecedented break with constitutional tradition

In codifying a pre-existing common-law right, the Second Amendment “did not expand, extend, or enlarge the individual right to bear arms at the expense of other fundamental rights.” *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012), *abrogated on other grounds by Bruen*. Rather, the right was understandably circumscribed by the common law of trespass, which predated the Second Amendment and reflected an expansive right to exclude without any special carve-out for firearms. *See, e.g., Baker v. Howard Cnty. Hunt*, 188 A. 223, 227-228 (Md. 1936) (surveying the history of “the relative rights of fox hunters” and finding “no doubt that ... if the hunter himself goes on the lands of another against the owner’s will, he is a trespasser”).

³ These courts have instead formulated the public carry right as a right to the *presumption* that an owner welcomes firearms *until the owner says otherwise*—a formulation that Plaintiffs now also seem to countenance. *See, e.g., May* Mem. at 26 (“If private businesses want to post signs telling people with CCW permits they are not welcome, they may do so ...”). But this *presumption* formulation fails for a host of reason, *see infra* Section I.B, which become especially evident once the defects in this first formulation are appreciated.

1 The historical absence of any firearms-related exception to the right to
2 exclude reflects the more general relationship between an owner’s right to exclude
3 and the rights of non-owners. Put simply, an entrant’s constitutional rights have
4 *virtually no* bearing on another’s use of their private property. Amici are aware of
5 only two potential instances where a private owner’s use of their property has been
6 constrained by the constitutional rights of non-owners: the enforcement of racially
7 restrictive covenants and restrictions on street expression in company towns. But
8 neither offers a rationale relevant to the Second Amendment.

9 In *Shelly v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court prohibited the
10 judicial enforcement of a racially restrictive covenant because the “[t]he owners of
11 the properties were willing sellers” and that “but for the active intervention of the
12 state courts, ... petitioners would have been free to occupy the properties in
13 question without restraint.” *Id.* at 19. In other words, *Kraemer* did not concern the
14 owners’ right to exclude; it instead pitted the sellers’ common-law right to
15 disposition of the property and the buyers’ constitutional right to equal treatment
16 against the rights of the other neighborhood residents to enforce the covenant.
17 That property rights were involved on both sides of the ledger makes it additionally
18 difficult to isolate the role of the equal-protection right in the Court’s analysis.

19 *Marsh v. Alabama*, 326 U.S. 501 (1946)—which held that a company
20 maintaining complete ownership over an Alabama town was barred by the First
21 Amendment from forbidding street distribution of religious materials—is similarly
22 inapposite. The Court later limited *Marsh*’s reach to the company towns of the
23 past, having recognized that “this Court has never held that a trespasser or an
24 uninvited guest may exercise general rights of free speech on property privately
25 owned.” *Lloyd Corp.*, 407 U.S. at 568; see *PruneYard*, 447 U.S. at 81 (“[W]hen a
26 shopping center owner opens his private property to the public for purpose of
27 shopping, the First Amendment to the United States Constitution does not thereby
28 create individual rights in expression.”). Entrants thus do not have rights of

1 expression on private property, regardless of whether the property is “open” or
2 “closed” to the public. That remains true even though, of course, the text of the
3 First Amendment—like that of the Second Amendment—does not draw an explicit
4 distinction between public and private property.

5 Other First Amendment rights likewise end at the private-property line,
6 regardless of whether the property is “open” or “closed” to the general community.
7 *See, e.g., Rowan v. U.S. Post Office Department*, 397 U.S. 728, 737-738 (1970)
8 (holding that “[t]he asserted [First Amendment] right of a mailer [to send
9 unwanted material to an unreceptive addressee] ... stops at the outer boundary of
10 every person’s domain” because “[t]o hold less would tend to license a form of
11 trespass”); *Breard*, 341 U.S. at 645 (upholding a municipality’s no-solicitation
12 default rule because “[i]t would be ... a misuse of the great guarantees of free
13 speech and free press to ... force a community to admit the solicitors of
14 publications to the home premises of its residents”); *Dietemann v. Time, Inc.*, 449
15 F.2d 245, 249 (9th Cir. 1971) (“The First Amendment [right to newsgathering] is
16 not a license to trespass[.]”); *Spanish Church of God of Holyoke, Mass., Inc. v.*
17 *Scott*, 794 F. Supp. 2d 304, 313 (D. Mass. 2011) (rejecting a defense to trespass
18 based in the right to religious exercise).

19 In short, a private owner’s fundamental control over their dominion means
20 that they can prohibit firearms, just as they can prohibit handbill distributors,
21 association members, newsgathering journalists, or religious observers. Had the
22 Court in *Bruen* wished to upset the constitutional status of the right to exclude and
23 private property at large, it would have said so. *Cf. Shalala v. Illinois Council on*
24 *Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“This Court does not normally
25 overturn, or so dramatically limit, earlier authority *sub silentio*.”).

1 **2. Nothing in *Bruen* indicates a break from longstanding**
2 **constitutional principles**

3 Plaintiffs assume—again, without giving any explanation—that *Bruen*
4 announced a right to carry that extends onto private commercial property.
5 Plaintiffs may believe this is so for the same reason animating the private-property
6 default decisions of the Northern District of New York, Western District of New
7 York, District of New Jersey, District of Hawaii, and District of Maryland district
8 courts: that the term “public” as used in the *Bruen* phrase “the public right to
9 carry” entails public property *and* private commercial property where people
10 congregate. But this expansive (and sociological rather than property-law)
11 understanding of the term “public” finds no support in *Bruen* itself. *Bruen* did not
12 involve a request to carry onto another’s private property and settled only that the
13 right extends beyond the home into “public” areas. Those district courts erred in
14 straying from background constitutional principles and the intuitive connection
15 between “public carry” and public property. This Court should not follow suit. *Cf.*
16 *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1124 (7th Cir. 1987) (“[D]istrict
17 judges in this circuit must not treat decisions *by other district judges*, in this and a
18 *fortiori* in other circuits, as controlling,” as those decisions are “entitled to no
19 more weight than their intrinsic persuasiveness merits.”).

20 Of the five courts to address this issue, four simply assumed that “public”
21 encompasses private commercial property. The only court to justify its “‘public’
22 includes private property” approach was the District of Hawaii district court. *See*
23 *Wolford v. Lopez*, 2023 WL 5043805, at *1 (D. Haw. Aug. 8, 2023). And its
24 misapprehensions are instructive. The court began by focusing on *Bruen*’s
25 pronouncement that “[n]othing in the Second Amendment’s text draws a
26 home/public distinction.” *Id.* at *15. If there is no distinction between home and
27 public, the court reasoned, then neither can there be “a distinction between public
28 places” and so *Bruen* must support the right to carry onto private commercial

1 property, too. *Id.* But this only begs the operative question of whether private
2 commercial property is a “public” place. The district court next invoked *Bruen*’s
3 references to “‘areas’” and “‘locations frequented by the general community.’” *Id.*
4 (quoting *Bruen*, 142 S. Ct. at 2135, 2148). Because private commercial property is
5 frequented by the general community, the court thought, it falls within the Second
6 Amendment’s scope alongside public property. But neither *Bruen* passage
7 suggests that an area’s being frequented marks it as a relevant Second Amendment
8 location; in those passages the Court only rejects New York’s proposal that a lower
9 standard of scrutiny be applied in crowded areas where safety concerns are
10 pronounced. In other words, the fact that *an area covered by the Second*
11 *Amendment* is crowded does not give the State additional leeway to regulate that
12 area (*e.g.*, the right is not necessarily weaker in a public town square than in a
13 public library). This observation hardly sheds light on whether private property is
14 one such covered “public” area. As before, it only begs the question.⁴

15 The answer—that “public” refers to public property—becomes clear in view
16 of the background constitutional principles described above. Further elucidative is
17 the fact that the Court has been careful to use qualified language like “property
18 open to the public” when referring to private commercial establishments in related
19 constitutional contexts. *See, e.g., Central Hardware Co. v. NLRB*, 407 U.S. 539,
20 547 (1972) (“The only fact relied upon for the argument that [private parking lots]
21 have acquired the characteristics of a public municipal facility is that they are
22

23 ⁴ Recognizing that *Bruen* is underdetermining, the district court went on to
24 consult extrinsic sources for interpreting “public.” It cited a Black’s Law
25 Dictionary definition that defines the term as “[o]pen or available for all to use,
26 share, or enjoy.” *Wolford*, 2023 WL 5043805, at *16 (citing *Public*, Black’s Law
27 Dictionary (11th ed. 2019)). But, setting aside the fact that no private commercial
28 establishment is actually “available for all to use [or] share” (*e.g.*, one cannot have
a picnic in a grocery store), many other definitions equate “public” with
“governmental.” *See, e.g., Public*, Merriam Webster’s Collegiate Dictionary (11th
ed. 2014) (“of or relating to a government”).

1 ‘open to the public.’”); *PruneYard*, 447 U.S. at 81 (noting that private commercial
2 property “does not ‘lose its private character’”). And the construction “public X,”
3 as the Court used when referring to “right to public carry” or “public carry right”
4 over fifty times across the *Bruen* majority opinion, typically indicates that public
5 property is at issue—as in “public right to navigability,” “public forum,” and
6 “public trust.” See, e.g., *Spokeo v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J.,
7 concurring) (discussing “public rights” like “free navigation of waterways” and
8 “passage on public highways”); *Police Department of Chicago v. Mosley*, 408 U.S.
9 92, 96, 99 & n.6 (1972) (“public forum”); *Phillips Petroleum Co. v. Mississippi*,
10 484 U.S. 469, 472 (1988) (“public trust”).

11 Thus, *Bruen* did not dramatically reconfigure the relationship between
12 private property and the Constitution by announcing a right to carry inside
13 another’s private property—a right that, for the reasons explained next, would have
14 the unprecedented effect of displacing a private owner’s right to exclude firearms.

15 **B. There Is No Right To The Presumption That A Private Owner**
16 **Welcomes Firearms Until The Owner Announces Otherwise**

17 Plaintiffs seem to argue that extending the right to carry into another’s
18 private property would not impede the owner’s ability to exclude firearms because
19 the right amounts only to the *presumption* that the owner permits firearms *until the*
20 *owner states otherwise*. See *May* Mem. at 26 (“If private businesses want to post
21 signs telling people with CCW permits they are not welcome, they may do so....”).
22 Formulating the right to carry as a freestanding constitutional right to only a
23 presumption may seem like a practical compromise between the interests of
24 licensed carriers and those of private owners, one that avoids the doctrinal disorder
25 wrought by a right that supersedes a private owner’s objection. But this *sui generis*
26 formulation is analytically and doctrinally incoherent.

1 **1. The *presumption* formulation is unprecedented and**
2 **incompatible with *Bruen***

3 First, nothing in the Court’s constitutional jurisprudence suggests that an
4 individual right can exist in the partial or defeasible form of a rebuttable
5 presumption conditioning exercise on the permission of another individual—here,
6 a private owner. Either there is a right to carry onto private property, in which case
7 that right would supersede an owner’s objection and States would be prohibited
8 from enforcing an owner’s opposition through criminal prosecution, or there is no
9 right to carry onto another’s property.

10 Consider the brief historical period after *Marsh*, 326 U.S. 501, when the
11 Court temporarily suggested that First Amendment rights can extend onto private
12 commercial property in special circumstances. Before the Court reversed course
13 and foreclosed any such possibility in *Lloyd Corporation v. Tanner*, 407 U.S. 551
14 (1972), it treated this right to free expression on private property as a trump—not a
15 mere entitlement to a presumption in the pro-expression direction. That right
16 supplied a constitutional defense to trespass actions and thereby prevented owners
17 from invoking trespass laws to exclude unwanted forms of expression. *See Marsh*,
18 326 U.S. at 501 (overturning a criminal trespass conviction); *Amalgamated Food*
19 *Emps. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319 (1968),
20 *overturned by Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (prohibiting the use of
21 trespass laws “to exclude those members of the public wishing to exercise their
22 First Amendment rights on the premises”).⁵ So too here: If this Court were to

23
24 ⁵ State courts and the lower federal courts similarly treated that right as a
25 trump—never as a mere presumption—during this period. *See, e.g., Schwartz-*
26 *Torrance Inv. Corp. v. Bakery & Confectionery Workers’ Union, Loc. No. 31*, 394
27 P.2d 921, 922 (Cal. 1964) (prohibiting owner from enjoining as trespass a union
28 protest); *Sutherland v. Southcenter Shopping Center*, 478 P.2d 792, 793 (Wash Ct.
App. 1970) (holding that “unconsented invasion of the property rights of owners
... to solicit signatures for an initiative is protected”), *overruled by Southcenter*
Joint Venture v. National Democratic Policy Committee, 780 P.2d 1282 (Wash.

1 recognize a right to carry onto another’s property, that right would likewise prevent
2 owners from invoking trespass laws to exclude unwanted firearms.

3 The presumption formulation is further belied by *Bruen*’s command that
4 Second Amendment rights be treated as trumps not subject to means-end scrutiny.
5 The Court was clear that *Heller* and *McDonald* “expressly rejected the application
6 of any ‘judge-empowering’ interest-balancing inquiry.” *Bruen*, 142 S. Ct. at 2129,
7 2130. Courts are thus not free to balance the purported right to carry onto private
8 property against the owner’s right to exclude firearms, with the aim of fashioning a
9 presumption that stops short of a trump. Instead, considering that a Second
10 Amendment right where it does apply is not to be modulated by competing
11 individual rights or societal demands, lower courts must be careful to define the
12 Second Amendment’s textual scope without displacing other constitutional
13 guarantees. Here that means rejecting the notion that the right to carry extends
14 onto private property.

15 Moreover, imaginatively recasting the right as a presumption hardly
16 salvages the right to exclude. In theory, owners with legal knowledge might
17 appreciate the need to affirmatively announce their opposition to firearms in a
18 world where an unwritten constitutional presumption exists over their property.
19 But the widespread expectation that silence does not confer an implied license to
20 bring firearms into one’s home or business, *see Ayres, Guests with Guns, supra*,
21 tbl.A6, makes it unlikely that most owners seeking to exclude firearms will take an
22 action necessary to override the presumption. A constitutionalized presumption,
23 like the *per se* formulation of the right, thus displaces owners’ expectations and
24 intentions regarding the uses of their property.

25
26
27 1989); *Central Hardware Co. v. NLRB*, 439 F.2d 1321, 1328 (8th Cir. 1971)
28 (holding that solicitation on company premises in violation of employer’s explicit
prohibition was protected), *vacated by Lloyd Corporation v. Tanner*, 407 U.S. 539
(1972).

2. **Plaintiffs’ only argument for the *presumption* formulation—that the right to carry is tied to the concept of “implied license” and can thus be withdrawn by private owners—is incoherent**

The only conceivable justification given by Plaintiffs for the *presumption* formulation of the right comes in the context of their *Bruen* Step Two historical analysis—not in the context of *Bruen* Step One—and relates to the common-law concept of “implied license.” According to Plaintiffs, because (1) “the public has implied consent to enter property open to the public,” and (2) “because the right to armed self-defense follows the individual everywhere he or she lawfully goes in public,” it follows that (3) “carrying on property open to the public is permitted unless the owner withdraws consent.” *Carralero* Mem. at 9 (citations and quotations omitted); *see also* *May* Mem. at 24. Plaintiffs draw this “implied consent” rationale from the New Jersey district court’s *Koons* opinion. *See id.* (citing *Koons v. Platkin*, 2023 WL 3478604, at *58, *61 (D.N.J. May 16, 2023)). But mapping the Second Amendment’s scope along the concept of implied license makes little sense as a matter of property or constitutional law.

First, Plaintiffs’ theory suggests that the community’s implied license to enter commercial property *in fact* includes permission to bring guns inside commercial property. But the notion that California’s business owners generally intend to invite guns inside their businesses is dubious.

An implied license is shaped by shared expectations as to permissible behavior. It is thus circumscribed and contextual—for instance, the implied license to enter a grocery store does not include license to picnic, just as license to enter a mall does not include running or riding a bike. *See also* Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 303 (1879) (observing that the license to enter a commercial establishment “is limited by the purpose” of the establishment); *May* Mem. at 24 (noting that “positive law and social convention” define the terms of permissible entry into commercial

1 property (quoting *Oliver v. United States*, 466 U.S. 170, 193 (1984) (Marshall, J.,
2 dissenting))). But before California’s enactment of SB2, few Californians even
3 knew whether permission to enter commercial businesses included permission to
4 bring a gun. If the right’s scope were to be mapped along implied license, the
5 questionable status of such a license on private commercial property makes it
6 difficult to see how Plaintiffs can satisfy their *Bruen* Step One burden.

7 *Second*, Plaintiffs’ “implied license” theory *supports* the constitutionality of
8 the mine run of potential prosecutions under the private-property default rule. On
9 Plaintiffs’ view, “the right to armed self-defense follows the individual everywhere
10 he or she *lawfully goes* in public.” *Carralero* Mem. at 9 (emphasis added). But
11 virtually all police arrests of an entrant inside private commercial property will be
12 preceded by some form of unlawful behavior or a directive from the owner to
13 leave, at which point the entrant’s license to remain on the premises—and the
14 constitutional protection that, on Plaintiffs’ view, attends that license—would be
15 withdrawn. *Cf. Wolford*, 2023 WL 5043805, at *16 (an implied license “is not
16 absolute, of course, and may be revoked if, for example, an invitee or licensee is
17 engaging in ... behavior that the business deems unacceptable”). Indeed, it is
18 difficult to imagine scenarios where an entrant *would remain* a lawful entrant at the
19 point of arrest.

20 **C. Alternative Theories As To How The Private-Property Default**
21 **Rule Implicates The Second Amendment Likewise Fail**

22 Even accepting that there is neither a right to carry onto another’s private
23 property over an owner’s objection nor a right that identifies an owner’s silence
24 with consent, Plaintiffs may argue that the rule still encumbers the (properly
25 understood) *Bruen* right to carry on *public property* in one of two ways. First,
26 Plaintiffs may insist that the rule implicates the Second Amendment not because of
27 any formal incompatibility between the rule and the right, but because the rule may
28 have the *effect* of reducing carry rates on public property (*i.e.*, gun owners who feel

1 disinclined from seeking consent to carry from private owners may decide to leave
2 their guns at home). Second, Plaintiffs may suggest that *owners* have a right to the
3 presumption that their silence implies consent to carry. Both theories fail.

4 **1. An “effects” theory is untenable**

5 *First*, aside from the Supreme Court’s passing references to potential as-
6 applied challenges to “shall-issue” licensing regimes that in practice operate as
7 “may-issue” regimes, *see Bruen*, 142 S. Ct. at 2138 n.9; *id.* at 2162 (Kavanaugh, J.,
8 concurring), nothing in either *Heller* or *Bruen* indicates concern for a statute’s
9 downstream effects on ownership or carry rates. In fact, concern over a law’s
10 indirect impact on protected conduct is characteristic of the means-end analysis
11 emphatically rejected in *Bruen*. *See id.* at 2129.

12 *Second*, an “effects” theory would be without a limiting principle and sweep
13 whole swaths of State regulation into the Second Amendment context. Countless
14 laws and regulations—including those that facially have nothing to do with
15 firearms, like general tort or criminal liability for injuries caused by accidental
16 discharges—have significant, if not comparatively greater, disincentivizing effects
17 on carrying. *See supra* Section I.A. Even a general criminal-trespass statute in
18 combination with the old “yes-carry” default rule has a substantial disincentivizing
19 effect, as countless storekeepers and landowners will continue to prohibit guns by
20 leveraging trespass liability under either default rule. A criminal statute that
21 prohibits the carrying of firearms over an owner’s express objection would
22 similarly have a significant disincentivizing effect and would likely be
23 unconstitutional under such an “effects” theory.

24 *Third*, even if effects were to matter constitutionally, the relevant
25 measurement is the reduction in carrying caused by owners who want to permit
26 visitors to carry guns but for some reason fail to contract around the “no-carry”
27 default. But the size of this effect is likely limited given the broad support for a
28 “no-carry” default. *See Ayres, supra*, at 187-189, tbl.A6.

1 **2. The rule does not implicate an owner’s *Heller* right to**
2 **possess or welcome guns**

3 In a separate vein, Plaintiffs suggest that the *Heller* right to possess guns on
4 one’s *own* property is implicated because the rule will purportedly impede owners’
5 ability to invite guns onto their premises. *See May* Mem. at 24-25. But the rule in
6 no way restricts an owner’s choice to admit gun-carrying entrants and is far less
7 likely than the “yes-carry” rule to effectuate a choice contrary to owners’
8 preferences. *See Ayres, supra*, at 187-189, tbl.A6.⁶

9 Still, Plaintiffs insist that a business owner’s *Heller* right to invite guns onto
10 their own premises is a right that should operate *passively*—that is, a right that
11 should kick in when an owner is silent or has yet to even contemplate, much less
12 decide, whether to invite guns into their businesses. But this view finds no support
13 in *Heller* or *Bruen* and is especially odd considering that constitutional rights are
14 typically exercised not unknowingly *but by choice*—*i.e.*, the choice to speak or to
15 no speak, or to possess guns or to no possess guns. *Cf. Blocher, The Right Not to*
16 *Keep or Bear Arms*, 64 Stan. L. Rev. 1, 26-50 (2012) (the Second Amendment
17 implies a right to not possess or host guns, just as the First Amendment implies a
18 right to not speak). On Plaintiffs’ view of the *Heller* right, *all* business owners
19 must exercise the right to invite guns into their establishments until they recognize
20 as much and decide to stop exercising the right. That turns conventional
21 understanding on its head.

22
23 ⁶ Likewise, the private-property default rule does not impermissibly
24 “compel” speech because (1) owners remain free to decide whether to post a notice
25 to opt out of the “no-carry” default, and (2) a “yes-carry” default “compels” the
26 posting of an opt-out notice in precisely the same manner, just in reverse. There is
27 no such thing as a neutral default: under either rule, some business owners will put
28 up signs that may “alienate some of their customers.” *May* Mem. at 26. This is
also why the countless other default rules structuring owner-entrant interactions—
including defaults against grazing, hunting, graffiti, and drone use, *see supra* pp. 4-
5—do not implicate the First Amendment.

1 To draw support for this unintuitive view, the *May* Plaintiffs make passing
2 comparison to a homeowner’s First Amendment right to receive door-to-door
3 solicitors—which, according to Plaintiffs, all owners unreflexively exercise until
4 recognizing as much and deciding otherwise (by, *e.g.*, posting a “No Solicitation”
5 sign). *See May* Mem. at 25. But this comparison fails. At the outset, the notion
6 that an owner’s right to receive solicitors must be exercised by default is
7 incompatible with the Court’s countenancing of “no-solicitation” default laws in
8 *Breard v. Alexandria*, 341 U.S. 622 (1951). *See supra* p. 5. Such laws preserve an
9 owner’s authority to admit solicitors and receive speech and are thereby
10 constitutionally distinguishable from no-solicitation *bans* or regulations that
11 reappropriate authority over entry decisions to the *State*. *Compare Breard with*
12 *Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150 (2002)
13 (striking down ordinance requiring that solicitors first obtain a City official’s
14 permission); *and Martin v. City of Struthers*, 319 U.S. 141, 147 (1943) (striking
15 down ban on solicitation because it no longer “leav[es] to each household the full
16 right to decide whether he will receive strangers as visitor”).⁷

17 Moreover, even if it were true that an owner’s right to receive solicitors
18 means that States are no longer constitutionally permitted to enact “no-solicitation”
19 default laws (an odd assumption considering their ubiquity, *e.g.*, City of Jersey
20

21 ⁷ The *May* Plaintiffs cite *Project 80’s, Inc. v. Pocatello*, 942 F.2d 635 (9th
22 Cir. 1991), for the view that an owner should not need to post a “Solicitors
23 Welcome” sign to receive solicitors. But that decision and its precursor, *Project*
24 *80’s, Inc. v. City of Pocatello*, 857 F.2d 592 (9th Cir. 1988), did not override
25 *Breard*. The Ninth Circuit assumed incorrectly that *Breard* had been impliedly
26 abrogated because it “was decided at a time when commercial advertising was
27 thought to be wholly unprotected by the First Amendment.” *Id.* at 594. But the
28 Court *did* afford commercial solicitation constitutional protection—it recognized
that the advertising of periodicals “does not put them beyond the protection of the
First Amendment”—while *also* recognizing that “[r]ights other than those of the
advocates,” like the privacy and exclusion rights of homeowners who did not want
to constantly engage solicitors, “are involved.” 341 U.S. at 642.

1 City, NJ Code of Ordinances § 245-7 (1978)), the comparison to “no-carry”
2 defaults is misleading. For one, solicitation involves only momentary presence on
3 another’s curtilage rather than an indefinite stint inside another’s establishment.
4 More importantly, the First Amendment—unlike the Second Amendment—is
5 ordered around content neutrality principles that are likely to subject *any law*
6 regulating specific forms of speech like solicitation to heightened scrutiny
7 (whether the law reflects a “yes-” or “no-solicitation” default). *See R.A.V. v. City*
8 *of St. Paul*, 505 U.S. 377, 387 (1992).⁸ But there is no such Second Amendment
9 neutrality principle rendering presumptively unconstitutional all laws referencing
10 “firearms.” Otherwise, the Court in *Bruen* would have skipped the Step One
11 inquiry entirely and started with Step Two.

12 * * *

13 In summary, the default rule does not implicate the Second Amendment’s
14 text. Extending the public carry right onto private commercial property would be
15 an unprecedented abrogation of the time-honored rights of owners to exclude
16 firearms. And this result cannot be avoided by restyling the right as a *presumption*
17 to carry *until the owner says otherwise*; that *sui generis* formulation is without
18 precedent and affirmatively foreclosed by *Bruen*.

19 CONCLUSION

20 Enduring principles of property law make clear that California’s private-
21 property default rule is constitutional. The Court should find the private-property
22

24 ⁸ This is why a default rule prohibiting the depiction of a hateful symbol on
25 another’s property without their permission would raise a constitutional problem.
26 Entrants, of course, have no right to post such a symbol on another’s property. Nor
27 does an owner’s right to invite an entrant in to post the symbol imply that *all*
28 *owners* must exercise this invitation by default—that would be absurd. But the
State is still barred from singling out a particular message for regulation based on
its content or viewpoint.

1 default rule constitutional in full, and therefore deny Plaintiffs' motions for
2 preliminary injunctions.

3
4 Dated: November 6, 2023
5 Los Angeles, CA

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Professors of Property Law, certifies that this brief contains 6,941 words, which complies with the word limit of L.R. 11-6.1.

Dated: November 6, 2023 /s/ Christopher T. Casamassima
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